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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

VIRGINIA STATE CORPORATION COMMISSION,
Petitioner,

TEXAS OFFICE OF PUBLIC UTILITY COUNSEL,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the use of the word "compensation" in 47 U.S.C. § 276 (enacted as part of the Telecommunications Act of 1996) express a "straightforward or unambiguous" Congressional intent to override states' authority to determine the local coin rate for pay telephones?

2. Does the Federal Communications Commission's ("FCC's") interpretation of § 276 violate the Tenth Amendment by conscripting state regulatory agencies to serve as subordinate federal agencies in implementing the FCC's national payphone policy?

PARTIES TO THE PROCEEDING

The petitioners are the Texas Office of Public Utility Counsel and the Virginia State Corporation Commission. Both petitioners are agencies of their respective states and, as such, do not fall within the requirements of Supreme Court Rule 29.6.

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OPINION BELOW

The initial opinion of the District of Columbia Circuit Court of Appeals reviewing the Federal Communications Commission's ("FCC's") Report and Order is reported at 117 F.3d 555 (D.C. Cir. 1997). App. at 1. Three petitions for rehearing, in whole or in part, were filed in response to the D.C. Circuit opinion. Certain interexchange carriers ("IXCs") also filed a motion for clarification or, alternatively, a motion for partial rehearing. On September 16, 1997, the D.C. Circuit granted in part and denied in part this motion for clarification in a supplemental opinion reported at 123 F.3d 693 (D.C. Cir. 1997). The remaining petitions for rehearing were all denied by the Court. App. at 41, 43. The FCC's Report and Order is reported at 11 F.C.C.R. 20,541 (1996) ("Payphone Order") and its Order on Reconsideration, at 11 F.C.C.R. 21,233 (1996) ("Reconsideration Order"). The relevant portions of the Payphone Order are reproduced in the Appendix. App. at 60.

JURISDICTION

On July 1, 1997, the D.C. Circuit granted in part and denied in part petitions for review of the FCC's First Report and Order. By supplemental opinion of September 16, 1997, the D.C. Circuit granted in part and denied in part the motion for clarification of certain IXCs. The Court denied the final petition for rehearing on October 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). See also Sup. Ct. R. 12.4.

STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue in this case are found in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 codified at 47 U.S.C. §§ 151 et seq. (1996) ("the 1996 Act") (all citations to the 1996 Act will be to the Act as codified in the United States Code). The most relevant provision is at 47 U.S.C. § 276. Also relevant to this case are §§ 1 and 2 of the Communications Act of 1934, codified at 47 U.S.C. §§ 151 and 152. These provisions are found in the Appendix at 77, 78.

STATEMENT OF THE CASE

A. Background

Until the breakup of the Bell system in the early 1980s, only local exchange telephone companies ("LECs") provided payphone services as part of basic telephone service. The costs of payphones and related equipment were included in the LECs' regulated rate base as local exchange facilities because the central office switch controlled most of the payphone operation. Accordingly, these services were subject to state regulation. Following the breakup of the Bell system, manufacturers developed "smart phones" that do not need to be controlled by the LECs' switches. Non-LEC payphone service providers ("PSPs"), therefore, developed in the 1980s and started to compete with LECs for payphone locations. In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128 (FCC 96-254), Notice of Proposed Rulemaking, 11 F.C.C.R. 6716 (released June 6, 1996) ("Payphone NOPR") ¶¶ 2-6.

State regulation of payphones, among other things, historically has addressed setting reasonable rates for payphone services. The rate for the local coin call, which is the type of payphone call that comprises approximately 80% of total call volume, was typically set by the state commissions in a range from $.10 to $.35 per call. States also frequently capped the rate for intrastate coin-paid toll services at the dominant carrier rate or at some increment over that rate. Id. at ¶ 19. In Texas, for example, the legislature, among other things, authorized the state commission to set a "just and reasonable rate" on local payphone calls to prevent exorbitant charges being imposed on callers by the payphone providers, prohibited charges for local directory assistance, capped 800-type calls at $.25, and limited charges for certain hotel or motel calls to no more than $.50. Public Utility Regulatory Act, 75th Leg., R.S., ch. 166, § 1, 1997 Tex. Sess. Law Serv. 713 (West) (to be codified at Tex Util. Code Ann. §§ 55.171-.252) ("PURA"). Until the FCC's Payphone Order, the Texas Public Utility Commission capped the local coin rate at $.25. Texas Public Utility Commission Substantive Rule § 23.54(g), 16 Tex. Admin. Code § 23.54(g) (West 1997) (prior to the November 13, 1997, amendments).

In Virginia, the state Constitution delegates the regulation of all telephone services to the Virginia State Corporation Commission, Va. Const. art. IX, § 2. Pursuant to that authority, the Virginia State Corporation Commission has historically determined the LEC payphone coin rate. That rate was increased from $.10 to $.20 in Application of the C&P Tel. Co. of Va., 1975 S.C.C. Ann. Rep. 153, 159 (Aug. 19, 1975) and from $.20 to $.25 in Application of the C&P Tel. Co. of Va., 1983 S.C.C. Ann. Rep. 307, 317 (Dec. 22, 1983). The Virginia coin rate for private PSPs was capped at the LEC rate by Rule 12, 20 Virginia Administrative Code 5-400-90, as authorized by § 56-508.15, et seq. of the Code of Virginia.

FCC regulation of payphones to date, however, has focused almost entirely on regulation of one segment of the industry involving carriers that provide operator-assisted long-distance service, known as operator service providers ("OSPs"). Payphone NOPR at ¶ 9. In 1984, the FCC determined that private payphone providers have a right to interconnect to the interstate telephone network. The FCC, however, further decided that the right to interconnect does not affect state regulation of payphones. The states "continue to determine the conditions under which these instruments may be used for local and intrastate toll services." Registration of Coin Operated Telephones, FCC No. 84-270, Mem. Op. and Order, 49 Fed. Reg. 27763, 27766 (1984). The FCC expressly determined in a later proceeding that states would regulate the rates and terms for local and intrastate payphone service on the grounds that such matters constituted "jurisdictionally intrastate communications." Universal Payphone Corp., Mem. Op. and Order, 58 Rad. Reg. 2d (P&F) 76, 80 (1988). App. at 45.

B. Telephone Operator Consumer Service Improvement Act

Prior to 1996, the FCC's efforts at payphone regulation arose from Congress passing the Telephone Operator Consumer Services Improvement Act ("TOCSIA"). Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226). Because operator services prior to divestiture had been provided exclusively by the Bell system at tariffed rates that were familiar to customers, there was widespread customer dissatisfaction with the varying rates and practices introduced by many OSPs after 1984. Congress passed the TOCSIA in response to this customer dissatisfaction. Payphone NOPR at ¶ 9.

Among other things, the TOCSIA required the FCC to initiate a rulemaking to implement § 226; to monitor OSP rates and practices, and to "consider the need" to prescribe compensation for payphone owners for certain interstate calls made using an access code. S. Rep. No. 439, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 1577, 1582.

The compensation provisions in the TOCSIA arose because PSPs argued that they were at a disadvantage compared to LEC payphones with respect to carrier-provided compensation for payphone calls. The LECs received some payment for every call placed on their payphone, either through a customer (coin deposits or credit card) or from other carriers (access charges paid by the IXCs). However, for certain calls, "dial around" calls, such as calls to 800 or 888 numbers and those dialed using a carrier access code, the PSP received no compensation from the carrier.

C. Telecommunications Act of 1996

The Telecommunications Act of 1996 represents the first major reform of telecommunications law since the passage of the 1934 Communications Act. Although the TOCSIA addressed carrier compensation for interstate calls, it did not resolve all payphone compensation issues; the TOCSIA did not address compensation to be provided payphone providers by carriers for intrastate calls or for 800-type calls. In the 1996 Act, Congress sought to address two specific problems -- ensuring fair compensation to payphone providers for both "interstate and intrastate" calls and preventing LEC subsidization and discrimination in favor of its own payphones.

Among other things, Congress sought to reform payphone regulation by requiring the FCC to develop a means by which

"all payphone service providers are fairly compensated for each and every intrastate and interstate call using their payphones." 47 U.S.C. § 276(b)(1)(A). Congress expressly required that "within 9 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations ... ." Id. Congress also required the FCC to prescribe rules to ensure that the Bell operating companies do not subsidize their payphone operations from their telephone exchange service operations and do not discriminate in favor of their own payphone operations. 47 U.S.C. § 276(a). Congress further granted the FCC authority to preempt any state requirement inconsistent with the FCC's payphone regulations. 47 U.S.C. § 276(c).

D. FCC Proceeding below

In response to the statutory directives of § 276, the FCC issued a notice of proposed rulemaking on June 6, 1996. After receiving comments from numerous parties, the FCC issued its Report and Order. In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket Nos. 96-128, 91-35 (FCC 96-388), Report and Order (released September 20, 1996), 61 Fed. Reg. 65,341 (October 7, 1996) (also found at 11 F.C.C.R. 20,541). The Report and Order concluded "full and unfettered competition is the best way of achieving Congress' dual objectives to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public." Id. at ¶ 55 (citing 47 U.S.C. § 276(b)(1)).

The FCC also found that a "deregulatory, market-based approach to setting local coin rates is appropriate, because

existing local coin rates are not necessarily fairly compensatory." Id. at ¶ 58. From April 15, 1997, the date upon which LECs were required to terminate certain subsidies associated with payphones, and for one year following the effective date of the new FCC payphone rules (i.e., October 7, 1997), states will be responsible for ensuring that private payphone providers are fairly compensated for local coin calls and for protecting consumers from excessive rates. Id. at ¶ 60.

Relying on § 276(c), the FCC preempted all state requirements, including the local coin rate, inconsistent with the FCC's rules regarding payphone compensation. Id. at ¶ 59. The FCC also provided an exception for states able to demonstrate that due to "market failure," market-based rates were not possible. To meet such a burden, a state must provide a record of a state proceeding that "examines the costs of providing payphone service within that state and the reasons why the public interest is served by having the state set rates within that market." Id. at ¶ 61.

Ironically, after preemption of an entire field of state utility regulation, the FCC turned to the states in order to implement its payphone decision. The Payphone Order placed substantial responsibilities on the various state utility commissions. Among other things, the FCC required as follows:

(a) Each state must review and remove any of its regulations applicable to payphones and payphone service providers that impose market entry or exit requirements.
(b) Each state must ensure that access to dialtone, emergency calls, and telecommunications relay service calls for the

hearing disabled is available from all payphones at no charge to the caller.

(c) Each state must review its rules and policies to determine whether it has provided for public interest payphones consistent with applicable Commission guidelines, evaluate whether it needs to take measures to ensure that such payphones will continue to exist in light of the Commission's implementation of Section 276 of the Communications Act, and administer and fund such programs so that such payphones are supported fairly and equitably. This review must be completed by September 20, 1998.

Id. at ¶¶ 48-50, 60, and at First Report and Order Appendix D (adding 47 C.F.R. § 64.1330) (1996) (emphasis added).

E. D.C. Circuit decision

Twenty petitions for review were filed in opposition to the Payphone Order, including those of nine state utility commissions. The D.C. Circuit had jurisdiction of the petitions for review pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1) and § 2344. The D.C. Circuit issued its opinion on July 1, 1997. The Court concluded, among other things, that the 1996 Act authorized the FCC to set local coin rates for payphones, the FCC's decision to deregulate local coin rates for payphones was not arbitrary and capricious for failing to address the possibility of "locational monopolies," and the FCC could set local coin rates according to market forces. Illinois Pub. Telecomm. Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997).

Various petitioners contended that the scope of the FCC's authority over the local coin rate was limited by § 152(b), citing Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 106 S. Ct. 1890 (1986). To resolve the § 152(b) question, the Court engaged in a textual analysis. The issue, as framed by the Court, was whether the term "compensation" as used in § 276 encompassed rates paid by callers. Specifically, the D.C. Circuit found:

> Because the only compensation that a PSP receives for a local call (aside from the subsidies from CCL charges that LEC payphone providers enjoy) is in the form of coins deposited into the phone by the caller, and there is no indication that the Congress intended to exclude local coin rates from the term "compensation" in § 276, we hold that the statute unambiguously grants the Commission authority to regulate the rates for local coin calls.

117 F.3d at 562. The Court relied on the term "compensation" appearing in other parts of the 1934 Communications Act in such a way as to include payments made by customers. See e.g. §§ 226; 203(c)(1); 309(j)(2)(A).

Additionally, both the Texas OPC and the Virginia State Corporation Commission filed petitions for rehearing and suggestions for rehearing en banc contending, among other things, that the FCC Payphone Order was invalid because it explicitly requires the sovereign states as states to enforce, by means of state regulatory power, federal payphone policies. App. at 90, 101. Such action, the petitioners contended, is improper because it converts the state commissions into federal field offices in violation of the Tenth Amendment and the

principles of dual sovereignty, as explicated through decisions of the U.S. Supreme Court. The D.C. Circuit denied these petitions for rehearing.

REASONS FOR ISSUING THE WRIT

Because the decision below conflicts with two landmark Supreme Court decisions, one involving federal-state telecommunications jurisdiction and the other involving unconstitutional federal mandates to state officials, that decision should be reviewed by this Court.

I. Section 276 does not express a "straightforward or unambiguous" Congressional override of states' authority to determine the local coin rate for pay telephones.

Section 2(b)(1) of the Communications Act of 1934, 47 U.S.C. § 152(b)(1) demonstrates that, for at least sixty-three years, Congress has intended a dual regime for the regulation of telephone service -- the FCC regulates interstate service, and the states regulate intrastate service. Section 2(b)(1) provides as follows:

> (b) Except as provided in sections 223 through 227, inclusive, and section 332, and subject to the provisions of section 301 and title VI, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, . . .

The dual regulatory system engenders many disputes as to which entity should regulate facilities and services that do not fall neatly into one category or the other. The courts have frequently been called upon to strike a delicate balance that allows the FCC to fulfill its interstate responsibilities without preempting the functions of the states and allows the states to fulfill their local responsibilities without impairing the FCC's interstate duties.

In 1986, this Court rendered the definitive analysis of the dual jurisdiction dilemma Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 106 S. Ct. 1890 (1986) (hereafter "Louisiana"). In Louisiana, the issue was the FCC's authority to preempt state ratemaking indirectly rather than directly. The FCC sought to exclude states from determining depreciation rates and practices. While the FCC's determination of depreciation rates would not directly set intrastate telephone rates, depreciation recovery is a major component in determining intrastate telephone rates. The Court, in Louisiana, reversed the FCC's attempt to control even a portion of the regulation of intrastate telecommunications.

In the current case, the FCC's regulations have directly preempted states' historic authority over the entire coin rate, rather than a single component of the rate's calculation. In a key respect, the preemption attempted here is quite similar to that attempted in Louisiana. In both cases, the FCC inferred that another section of the Act authorized it to disregard § 2(b). In Louisiana, the FCC argued that § 220 of the Act gave it preemptive authority over intrastate depreciation practices, just

as it now argues that § 276 gives it exclusive jurisdiction over intrastate payphone rates.[1]

Here, the FCC asserts that § 276(b)(1)(A)'s requirement that it establish a per call compensation plan "for each and every completed intrastate and interstate call" means Congress also gave it exclusive jurisdiction over intrastate ratemaking for payphones. However, if Congress had intended that end-user ratemaking authority be encompassed in the compensation plan, it could have plainly said so.

The FCC also asserts that Congress intended it to occupy the entire field of ratemaking because § 276(c) provides that its payphone regulations shall preempt inconsistent state requirements. A more accurate reading of § 276(c) is that state requirements not conflicting with § 276(b)'s legitimate regulations remain in effect and only the state requirements inconsistent with § 276(b)'s authorized regulations are preempted. In other words, subsection (b) authorizes the FCC to prescribe specific payphone regulations assuring compensation, eliminating subsidies, and erecting nonstructural

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[1] In the depreciation preemption case, the FCC argued that § 220(b) required that it prescribe classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property. That section also prohibits carriers, once the FCC has prescribed classes of property and percentages, from charging to operating expenses anything other than the FCC prescribed charges, classifications, or percentages. 476 U.S. at 366-67, 106 S. Ct. at 1897. The FCC also argued in Louisiana that other subsections of § 220 bolstered its exclusive authority over depreciation. Id. at 367. Despite these arguments, and regardless of the language of § 220, the Court found that the FCC's depreciation authority under § 220 was inadequate to countermand § 2(b).

safeguards for Bell payphones. Subsection (c) merely protects those regulations from contrary state requirements.

For example, the FCC's rule at 47 C.F.R. § 64.1330(b) requires each state to ensure access to dialtone, emergency calls, and telecommunications relay service calls at no charge to the caller. If a state regulation were to also require no charge for calling the PSP to report instrument trouble or to request a refund, subsection (c) authorizes the FCC to preempt that state requirement for being inconsistent with its rule. Subsection (c) is not an explicit jurisdictional countermand of § 2(b)'s preservation of state ratemaking authority. As was found necessary in Louisiana, the two provisions of the Act can be read to preserve the respective jurisdictional functions of state and federal authorities without conflict and without prejudice.

The FCC's § 276 arguments herein must meet the same fate as its § 220 arguments in Louisiana. As the Court noted there, the meaning of § 220 was not "so unambiguous or straightforward as to override the command of § 152(b) that 'nothing in this [Act] shall be construed to apply or to give the [FCC] jurisdiction' over intrastate service." 476 U.S. at 377, 106 S. Ct. at 1903. (Emphasis in original.) The meaning of § 276 is just as ambiguous and indirect as § 220, and it too fails to demonstrate an intent to override § 2(b).

In its Louisiana analysis, this Court discussed § 2(b) in the context of other sections of the Act. First, the Court in Louisiana reconciled § 2(b) with the national telecommunications goals established by § 1 of the Act.

> In interpreting §§ 151 and 152(b), we are guided by the familiar rule of construction that, where possible, provisions of a statute should be

> read so as not to create a conflict. Washington Market Co. v. Hoffman, 101 U.S. 112, 25 L. Ed. 782 (1879). We agree with petitioners that the sections are naturally reconciled to define a national goal of the creation of a rapid and efficient phone service, and to enact a *dual* regulatory system to achieve that goal. Moreover, were we to find the sections to be in conflict, we would be disinclined to favor the provision declaring a general statutory purpose, as opposed to the provision which defines the jurisdictional reach of the agency formed to implement that purpose.

476 U.S. at 370, 106 S. Ct. at 1899. (Emphasis in original.) Secondly, the Court found that § 2(b) was "not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction." 476 U.S. at 373, 106 S. Ct. at 1901. While noting the telephone companies' concerns that state regulators might not allow them to recover sufficient revenues, the Court observed that § 2(b) "precludes both the FCC and this Court from providing the relief sought. As we so often admonish, only Congress can rewrite this statute." 476 U.S. at 376, 106 S. Ct. at 1902.

Congress has not acted upon that admonition to rewrite §§ 220 or 2(b). If Congress, after the Louisiana decision, had indeed intended the FCC to have exclusive control over depreciation practices, it would have explicitly amended §§ 2(b) and 220 to accomplish it. Indeed, Congress has faithfully adhered to § 2(b)'s rule of statutory construction since 1986. In every instance where Congress found it proper to grant exclusive jurisdiction to the FCC over telecommunications

matters that had previously been regulated by the states, it did so by an unambiguous or straightforward override of § 2(b).[2]

In 1990, Congress gave the FCC authority over the establishment, implementation, and operation of telephone relay services for those with hearing or speech impairments, 47 U.S.C. § 225. Such relay services were already operational in several states, including Virginia, but Congress sought to assure national uniformity by giving the FCC authority over intrastate relay services as well as interstate services. Knowing that § 2(b)'s ban on FCC authority had to be addressed head-on, Congress used explicit language to effect the preemption. The very first subsection of § 225 is straightforward and unambiguous:

> (a) DEFINITIONS.--As used in this section--
>
> (1) COMMON CARRIER OR CARRIER.--The term "common carrier" or "carrier" includes any common carrier engaged in interstate communication by wire or radio as defined in section 3(h) and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 2(b) and 221(b). (Emphasis added).

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[2] Louisiana and subsequent cases still recognize the "impossibility" exception whereby federal preemption of state telecommunications authority occurs by implication when it is physically impossible for dual systems to coexist. See 476 U.S. at 375, 106 S. Ct. at 1902, especially footnote 4. However, the FCC has not raised that argument here. As noted by the Court below, "in this case the Commission has never argued that it has jurisdiction over local coin call rates merely by implication." 117 F.3d at 563.

Additional references to the authority granted the FCC over intrastate telephone relay services are found at 47 U.S.C. § 225(b).[3]

Again in 1993, Congress used similar language in preempting states from entry or rate regulation of commercial mobile service providers (cellular, PCS, and paging services). Until then, many states, including Virginia, had regulated the intrastate operations of such radio-based telecommunications companies. In 1993, Congress added § 332(c)(3)(A) to the 1934 Act:

> Notwithstanding Sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service. . . .

47 U.S.C. § 332(c)(3)(A) (emphasis added).

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[3] Congress' intent to treat intrastate carriers the same as interstate is explicitly spelled out in § 225(b)(2) as follows:

> USE OF GENERAL AUTHORITY AND REMEDIES.--For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this title with respect to any common carrier engaged in interstate communication. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of this Act by a common carrier engaged in interstate communication.

Moreover, for both those statutory changes, Congress also amended § 2(b) itself to refer to the overriding sections, §§ 225 and 332. Other than the "impossibility" exception, § 2(b) and Louisiana leave no room for preemption of state regulatory authority by implication.

In spite of the jurisdictional tension caused by this provision, Congress has not rewritten § 2(b). Congress made no modification to § 2(b) when it passed the Telecommunications Act of 1996, the first major rewrite of the Communications Act since 1934. This reaffirmation occurred nearly ten years after the Louisiana decision. Congress and the entire telecommunications industry thus had nearly a decade of experience adhering to Louisiana's "rule of statutory construction," and when presented an opportunity to eliminate or modify § 2(b), Congress did not do so.

Had Congress, in enacting § 276, intended to preempt state regulation of coin phone rates along with assuring fair compensation, it would have used the same explicit "notwithstanding § 2(b)" language that it used in 1990 and 1993 when enacting §§ 225 and 332 (see above) and would have inserted § 276 into the excepted clauses in § 2(b). The absence of explicit override language in § 276 demonstrates that Congress did not intend to confer upon the FCC authority to preempt states in determining local coin rates. The other preemption alternative in the 1996 Act would have been for Congress to delete § 2(b) altogether. Since Congress enacted none of these alternatives, § 276 shows no more Congressional intent to preempt payphone rates than did § 220's intent to preempt depreciation, as determined in Louisiana.

The expansive interpretation given to § 276 by the FCC and affirmed by the D.C. Circuit, below, contravenes Louisiana

by focusing on the word "compensation" in the phrase "establish a per call compensation plan. . . ." The word "compensation" was construed by that Court as an unambiguous or straightforward authorization for the FCC to set the rate for coins deposited for local calls. 117 F.3d at 562. The Circuit Court found "there is no indication that the Congress intended to exclude local coin rates from the term 'compensation'. . . ." Id. at 562.

The above quote shows that the Circuit Court applied the wrong § 2(b) standard. It was not incumbent upon the petitioners to show that the term "compensation" was not intended to include local coin rates. Rather, Louisiana places the burden on respondents to show that § 276 unequivocally overrides the long history of state regulation of the local coin rate. As shown above, Congress can and has been explicit when it intended to override § 2(b) in order to preempt state regulation of intrastate telecommunications. As used in § 276, the term "compensation" does not show an intent to authorize specific FCC rate preemption. Instead, nothing more is required than that the FCC establish a mechanism for fair compensation that covers all calls.

The FCC's own long distance compensation plan ("carrier pays") demonstrates that the payphone provider can be compensated for use of its phone without asserting jurisdiction over the rate paid by the end-user. The "carrier pays" system requires the billing long distance carrier to remit, from its revenues, a per call payment to the payphone provider. The long distance carrier then has discretion as to whether to pass that charge on to the end-user.

A more accurate interpretation of § 2(b) and Louisiana was recently rendered by the Eighth Circuit Court of Appeals in

Iowa Util. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) petition for cert. filed, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-831) (hereafter "Iowa"). The Circuit Court in Iowa noted that "Congress is fully capable of opening the gate in the 2(b) fence in order to grant the FCC intrastate rate-making authority when it wishes to do so." 120 F.3d at 797.

The Eighth Circuit discussed the direct and unambiguous non-pricing authority Congress had granted the FCC in § 251.

> For instance, subsection 251(b)(2) burdens LECs with '[t]he duty to provide . . . number portability in accordance with requirements prescribed by the [FCC].' 47 U.S.C.A. § 251(b)(2) (West Supp. 1997). In contrast, no provision of the Act unambiguously requires rates for the local competition provisions to comply with FCC-prescribed requirements, no provision unambiguously directs the FCC to issue such pricing regulations, and there is no straightforward and unambiguous modification of section 2(b) in the Act. (Footnote omitted). Consequently, section 2(b) remained a barrier to the validity of these FCC pricing rules.

Id. at 797.[4] (Emphasis in original.)

A correct application of Louisiana would not impair the FCC's abilities, under § 276, to implement a national payphone

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[4] Admittedly, the Iowa decision cited to the decision below, Illinois Pub. Telecomm. Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997) and discussed § 276 as standing in stark contrast to the lack of intrastate pricing authority in § 251. 120 F.3d at 797. This discussion about § 276 is dicta and, as demonstrated herein, the Eighth Circuit's reliance on Illinois was misplaced.

compensation plan. Such an interpretation is consistent with the FCC's "carrier pays" compensation plan, assuring uniform compensation to payphone providers for all "dial around" long distance calls, while still allowing states to retain their long-standing authority under § 2(b) to determine rate regulation, including the coin rate for payphones, for intrastate telecommunications. In the words of the Eighth Circuit, in Iowa, "thus the FCC's traditional jurisdiction over interstate communications will not be negated by the states' regulation of the rates for [intrastate] services." Id. at 799.

II. The FCC's interpretation of § 276, as affirmed below, violates the Tenth Amendment by conscripting state regulatory agencies to serve as subordinate federal agencies in implementing the FCC's national payphone policy.

The D.C. Circuit erroneously determined that Congress had expressly overridden § 2(b) in § 276. As a consequence, the Court approved of the FCC's preemption of state ratemaking authority over the local coin rate. Irrespective of whether this Court should find that § 276 authorizes the FCC to preempt state ratemaking authority, the FCC regulations nonetheless violate the Tenth Amendment by conscripting states and state agencies to implement federal regulations.

The FCC's Payphone Order places a significant regulatory responsibility on the states. The FCC issued a federal rule at 47 C.F.R. Part 4 compelling the states to administer § 276 as set forth in the Payphone Order. For example, the FCC required that

> [e]ach state must review its rules and policies to determine whether it has provided for public interest payphones consistent with applicable Commission guidelines, evaluate whether it needs to take measures to ensure that such payphones will continue to exist in light of the Commission's implementation of Section 276 of the Communications Act, and administer and fund such programs so that such payphones are supported fairly and equitably.

Payphone Order Appendix D (adding 47 C.F.R. § 64.1330(c)).

The FCC's Payphone Order, therefore, requires states to conduct evaluations of state policies and not only eliminate provisions inconsistent with federal regulations, but also provide, fund and administer programs that are consistent with federal policy to establish and maintain public interest payphones.

This federal requirement clearly goes beyond delegating merely ministerial tasks, and imposes upon the states, in their sovereign capacities, a policy-making, program-enacting role pursuant to § 276. This aspect of the Payphone Order raises a serious question important to the continuing viability of cooperative federalism in the area of telecommunications. Because of the FCC Payphone Order, each state utility commission (which under the delegation doctrine acts only as authorized by the state legislature) must now deregulate its local coin rate and implement and fund public interest payphone programs, regardless of what that state's legislature may have decided its policy regarding local payphone operations should be. Establishment and maintenance of public interest payphones may be a laudable goal, but it must be left to each

state expected to fund such programs to come to that conclusion. If Congress has determined that as a national goal, the federal government itself is required to enact, fund and administer these programs on its own or to work with the states in a voluntary, non-coercive manner to achieve such goal. See New York v. United States, 505 U.S. 144, 178; 112 S. Ct. 2408, 2429 (1992).

Admittedly, the Court has always recognized that federal law may be upheld against a Tenth Amendment challenge when the federal government only requires "consideration of federal standards" by the states and does not "directly compel the States to enact a legislative program." FERC v. Mississippi, 456 U.S. 742, 764-765, 102 S. Ct. 2126, 2140-41 (1982). That is not the case here. Section 64.1330(c) requires not only state consideration of federal standards but action to enact federal programs. In Mississippi, the federal law was upheld because it adopted a "less intrusive scheme and allowed the states to continue regulating in the area on the condition that they consider the suggested federal standards." Id. at 765. That option is not presented to the states here. See Payphone Order ¶ 59, n. 207, compelling states to adopt the national deregulatory standard.

The regulations promulgated by the FCC are also unlike those reviewed by this Court in Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289, 101 S. Ct. 2352, 2366-67 (1981), in which this Court found that the Surface Mining Act established a program of "cooperative federalism" that allows states, within the limits established by federal minimum standards, to enact and administer their own regulatory programs to meet their own needs. In the present case, the FCC imposes policy goals on the states pursuant to 47 C.F.R. § 64.1330(c) and requires the states to fund and

administer federal, not state, regulatory programs to meet federal, not state, needs.

Tenth Amendment jurisprudence, as further explained in New York and Printz v. United States, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997), broadly prohibits the national government from compelling or coercing the states or officials of the state to implement federal regulatory programs through state actions. In New York, the Court struck down, as violations of the Tenth Amendment, certain coercive "take title" provisions of the Low-Level Radioactive Waste Policy Act, which required states to either take title to waste or regulate according to federal standards. New York v. United States, 505 U.S. at 188, 112 S. Ct. at 2435. In this case, the FCC's actions are similar to the type of regulatory decrees that the Court in New York found flawed -- positive requirements that compel the state to take certain regulatory actions, arising as a result of federal laws.

Justice O'Connor's words in New York, concerning the Low-Level Radioactive Waste Policy Amendments Act, rebuke federal actions, like that taken by the FCC in this case.

> The Federal Government may not compel the States to enact or administer a federal regulatory program.... The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders. While there may be many

> constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, the method Congress has chosen is not one of them.

505 U.S. at 188, 112 S. Ct. at 2435.

Furthermore, the Court should hear this case because the FCC's Payphone Order, as approved by the D.C. Circuit, is at odds with its decision in Printz v. United States, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997). That case was handed down just a few days before the D.C. Circuit issued its decision concerning the FCC's payphone order. In Printz, the Supreme Court held that federal regulations, promulgated pursuant to the Brady Act, which required state officials to conduct background checks on prospective purchasers of handguns prior to purchase, were not a proper exercise of Commerce Clause powers because Congress may not "compel" state officers to execute federal laws, even ministerial tasks, under separation of powers and principles of dual sovereignty.

In the Printz case, the Court noted that compulsion existed because persons who knowingly violate the provisions of the Gun Control Act, including the Brady Handgun amendments, are subject to fine, imprisonment, or both. Printz, 117 S. Ct. at 2379, 138 L. Ed. 2d at 925 (citing 18 U.S.C. § 922(a)(5)). Just as the federal government may not compel state officials to conduct background checks or face penalties under law in the Printz case, and just as the federal government may not compel states to regulate radioactive waste or take title to such waste in the New York case, in the Payphone Order, the FCC may not compel the states to fund and administer federal payphone programs at the risk of having officials of that state face the possibility of sanctions under federal law.

The second aspect of Tenth Amendment jurisprudence relates to political accountability. Maintaining political accountability touches upon fundamental federal issues, deserving rehearing, because of their importance to the political process. The Court in Printz held:

> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

117 S. Ct. at 2382, 138 L. Ed. 2d at 941. The FCC Payphone Order imposes upon the states several new regulatory requirements as set out in 47 C.F.R. § 64.1330. Although the federal government has imposed this requirement upon the states, the mandate is unfunded, just as in Printz. The financial burden of implementing these requirements must, therefore, be absorbed by the states.

Even if the states incur no financial burden, they are still accountable to the local electorate for their actions as regulators. State utility commissions can only act, given the delegation doctrine, as authorized by state law. Therefore, the states can fully expect to be held accountable to their constituents for administering the new rules of the FCC. This Court in Printz reasoned that mandates which divest the federal government of any political accountability for its actions by placing such

accountability upon state governments are flawed under the Tenth Amendment. Id. Accordingly, the requirements of 47 C.F.R. § 64.1330 are inconsistent with the holding in Printz.

CONCLUSION

For all the reasons discussed above, the petition should be granted.

Respectfully submitted,

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